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Supreme Court of the United States

OCTOBER TERM 1973

No. 73-191

The VILLAGE OF BELLE TERRE, an incorporated municipality, JAMES PHILBIN, Mayor of the Village of Belle Terre, ROBERT DOERR, Deputy Mayor and Trustee of the Village of Belle Terre, VINCENT BOVE, Trustee of the Village of Belle Terre, VINCENT KARWOWSKI, Trustee of the Village of Belle Terre, and FRANCIS STOLZ, Trustee of the Village of Belle Terre,

Defendants-Appellants,

—against—

BRUCE BORAAS, ANNE PARISH, MICHAEL TRUMAN, EDWIN DICKMAN and JUDITH DICKMAN,

Plaintiffs-Appellees.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE APPELLANTS

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Opinions Below

The Opinion of the Court of Appeals for the Second Circuit (J.S. 1a-50a*), together with two opinions issued upon denial of rehearing *en banc*, is reported at 467 F.2d 806. The opinion of the District Court (J.S. 51a-80a) is unreported.

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* References to "J.S." are to the jurisdictional statement. References to "A" are to the single appendix.

Jurisdiction

The final judgment of the Court of Appeals was entered May 1, 1973 (J.S. 81a). Notice of Appeal to this Court was filed with the Court of Appeals May 17, 1973 (J.S. 86a). The appeal was docketed by filing a jurisdictional statement July 27, 1973 and this Court noted probable jurisdiction October 15, 1973. The jurisdiction of this Court rests on 28 U.S.C. 1254 (2) since the United States Court of Appeals held a state statute invalid as repugnant to the United States Constitution. A municipal ordinance qualifies as a "state statute" under section 1254 (2). *Chicago* v. *Atchison, T. & S.F. R. Co.*, 357 U.S. 77, 82; *United Gas Pipe Line Co.* v. *Ideal Cement Co.*, 369 U.S. 134; Stern & Gressman, Supreme Court Practice 31-32.

Question Presented

Whether six unrelated students at the State University at Stony Brook have a constitutional right to occupy a one family residence in violation of a Village Zoning ordinance which defines its one family zoning district in terms of a family related by blood, adoption or marriage or, in the alternative, not more than two unrelated individuals.

Subsidiary to this basic question is the question whether the ordinance regulates a fundamental constitutional right so as to require a compelling governmental interest in justification; or lacking a fundamental right whether the interests affected occupy some intermediate position on a sliding scale of judicial scrutiny; and failing that, whether the ordinance is rationally adapted to a legitimate governmental purpose.

RELEVANT ORDINANCE PROVISIONS

BUILDING ZONE ORDINANCE OF THE VILLAGE OF BELLE TERRE

ART. II, SECTION DT-1.0. For the purpose of this Ordinance the Village of Belle Terre will consist of one (1) district to be known as "A" Residence District.

DT-1.1. The boundary of said district is hereby established as identical to the Village boundaries.

DT-1.2. No building shall be erected, altered, or used and no premises shall be used for any other than a purpose permitted in this "A" residential zone.

ART. III, SECTION A-1.0. "A" Residence District No. building or premise shall be used and no building shall hereafter be erected or altered unless provided in this Ordinance except for one (1) or more of the following uses:

(1) One family dwellings.

(2) Public parks, playgrounds, recreational areas, and real property and structures owned and operated by the municipality and for municipal purposes of the Village of Belle Terre.

(3) Accessory buildings, including one (1) private garage when located on the same lot and when meeting requirements of Article III. Section A-1.4a: A-1.4b: and A-1.4c and when such buildings are incidental to the principal use of the dwelling and do not include any activity commonly conducted as a business. The private garage may be within or attached to the dwelling.

ART. I, D-1.34a. One Family Dwelling. A detached house consisting of or intended to be occupied as a residence by one family only, as family is hereafter defined, in no

case shall a lodging house, boarding house, fraternity house, sorority house or multiple dwelling be classified or construed as a one family.

D-1.35a. Family. One or more persons related by blood, adoption or marriage, living and cooking together as a single housekeeping unit, exclusive of household servants. A number of persons but not exceeding two (2) living and cooking together as a single housekeeping unit though not related by blood, adoption, or marriage shall be deemed to constitute a family.

ART. VIII, SECTION M-1.4a(2). Each violation of this Ordinance shall constitute disorderly conduct. Every person violating this Ordinance, including the owner . . . and the lessee or tenant of an entire building or structure or premise in which part such violation has been committed or shall exist . . . or any other person who knowingly commits, takes part or assists in any such violation . . . shall be a disorderly person and shall be liable for and pay a penalty not exceeding One Hundred Dollars ($100.00) or by imprisonment for a period not exceeding 60 days or by both such fine and imprisonment. A separate and distinct offense shall be deemed committed on each day during or on which a violation occurs or continues.

Statement of Facts

Appellant Belle Terre is an incorporated Village of the Fourth Class located on the North Shore of Long Island in Suffolk County, New York. The Village includes approximately 220 homes inhabited by about 700 people (J.S. 2a) and has a total land area less than one square mile (Special

Report on Municipal Affairs, State Comptroller, Leg. Doc. No. 95, transmitted to the Legislature April 2, 1970 [hereinafter cited as Comptroller's Report] at 130). The Village is located wholly within the Town of Brookhaven (population 250,000 (J.S. 58a), land area 270.1 square miles (Comptroller's Report at 58) whose zoning would permit occupancy by groups whose members are unrelated by blood, adoption, or marriage. (J.S. 58a).

The Building Zone Ordinance of the Village restrict the use of land to single family houses. Family is defined as follows:

> One or more persons related by blood, adoption or marriage, living and cooking together as a single housekeeping unit, exclusive of household servants. A number of persons but not exceeding two (2) living and cooking together as a single housekeeping unit though not related by blood, adoption or marriage shall be deemed to constitute a family (J.S. 54a).

Appellees, Edwin and Judith Dickman, are the owners of a house in the Village of Belle Terre (J.S. 51a). They leased the house, on or about December 1, 1971, to appellee Michael Truman for a period of 18 months, said lease to terminate on May 31, 1973 (J.S. 52a). On or about June 1, 1972, appellee Bruce Boraas became a co-lessee (J.S. 52a). At about the same time appellee Anne Parish moved into the house occupied by the two lessees (J.S. 53a). Three other persons, not parties to this action, also became residents of the house. (J.S. 2a).

Two houses opposite the Dickman house, have each been rented at 350 dollars per month. One like the Dickman

house contains six bedrooms; the other is a four-bedroom house. (J.S. 57a). The lease on the Dickman house required monthly rent payments of five hundred dollars plus a one thousand dollars security deposit. All six residents made monthly payments and posted security, to defray these expenses, in proportion to the quality of their sleeping quarters. (A9, A11).

Of the six, all of whom are students at the State University at Stony Brook in the town of Brookhaven, none is related to any of the others by blood, adoption or marriage. During their occupancy of the Dickman house, the students ate dinner together and all performed household and yard-keeping chores. In addition to the aforementioned rent and security expenses, all contributed toward groceries, newspapers, telephone service, utilities, fuel oil and milk. (J.S. 53a).

On or about June 13, 1972, respondents Boraas and Parish were informed, at a meeting of the Village of Belle Terre Board of Trustees, that their occupancy of the Dickman house violated the Village Zoning Ordinance and that the Village intended to institute remedial legal proceedings. (A13).

On July 19, 1972, respondents, Edwin and Judith Dickman, were served with a Criminal Summons returnable before the Village Justice on July 28, 1972, charging them with a violation of the one-family Zoning Ordinance (J.S. 4a). The ordinance provides, *inter alia*, that each violation of its provisions shall constitute "disorderly conduct" and that the owner and lessee or tenant of a building where a violation occurs:

> shall be a disorderly person and shall be liable for and pay a penalty not exceeding One Hundred Dollars ($100.00) or by imprisonment for a period not exceeding 60 days or by both such fine and imprisonment. A separate and distinct offense shall be deemed committed on each day during or on which a violation occurs or continues. (J.S. 4a).

Because the summons was served without having been preceeded by a 48 Hour Notice of Violation from the Village Building Inspector, the Village Counsel temporarily withdrew the Summons on July 28, 1972. This was followed on July 31, 1972, by service upon respondents Edwin and Judith Dickman, by the Village Building Inspector of the 48 Hour Order to Remedy Violation. On August 2, 1972, the present action was begun by the plaintiffs in the District Court, under 42 U.S.C. 1983 for an injunction and a judgment declaring the zoning ordinance unconstitutional. (J.S. 4a-5a). At that time, District Judge John F. Dooling, Jr. signed a temporary restraining order staying criminal proceedings and suspending the 48 Hour Order to Correct Violation pending the outcome of plaintiffs' action. (J.S. 5a).

On September 20, 1972, the District Court per Dooling, *J.*, denied the motion for a preliminary injunction in a decision upholding the validity of the ordinance. (J.S. 5a) because of the state interest in protecting and fostering the traditional family pattern through zoning limiting some areas to single family occupancy. The Plaintiffs appealed the denial of the preliminary injunction to the Second Circuit Court of Appeals, which reversed and remanded (J.S. 25a). That Court found that the goal of preference for traditional family organization through zoning "fails to fall

within the proper exercise of state police power" (J.S. 18a). The Court of Appeals found in addition that the distinction between related families and unrelated groups could not be proved to promote traditional physical zoning objectives, such as control of population density, traffic congestion and property values. On remand the District Court entered a final judgment declaring the relevant portion of the ordinance unconstitutional and permanently enjoining its enforcement (J.S. 83a-85a). In order to procure finality the Village appealed to the Second Circuit Court of Appeals which, in light of its prior determination, summarily affirmed the declaratory judgment and injunction on May 1, 1973. (J.S. 81a-82a). From this judgment the Village and the individual defendants appeal to this Court.

Statement of changed circumstances pending appeal

As recommended in Stern & Gressman, Supreme Court Practice 592, Counsel for Appellants call the Court's attention to a change in circumstances pending this appeal.

As of September 13, 1973, when Plaintiff-Appellees filed their motion to affirm, they noted (page 2 note 1): "The leasehold arrangement which was to expire on May 31, 1973 has been extended. And of the original tenant plaintiffs in this action, Bruce Boraas and Michael Truman continue to occupy the house which they share with the other students with whom they are not related. Anne Parish is no longer a resident of Belle Terre."

On October 23, 1973, counsel for Appellant was notified by a letter from the Village Attorney that the Plaintiff students no longer occupied the house owned by Plaintiffs Dickman. Further inquiry disclosed that they left sometime

in September. The Dickmans are presently (as of November 23, 1973) holding their house out for sale or rent, including to student groups—motivated by the same interest originally stated in their affidavit: "It is in our economic interest to continue to rent to them. Moreover, we are sympathetic to the needs of responsible students at Stony Brook who are unable to find adequate housing at a cost which they can afford." (A37)

Appellants submit that the case is not moot for two independently sufficient reasons. First, the Dickmans are co-Plaintiffs and continue to insist on violating the Belle Terre ordinance. A live and continuing adversary dispute exists between the Village and the Dickmans. Second, given the usual short duration of student leases the case is one like *Dunn* v. *Blumstein*, 405 U.S. 330, in which yearly challenges to the zoning law could be repeated yet evade review if termination of the short lease mooted the case pending appeal. (Accord, *Southern Pacific Terminal Co.* v. *ICC*, 219 U.S. 498; *Roe* v. *Wade*, 410 U.S. 113.)

Summary of Argument

Point I will argue that the Court of Appeals was incorrect in testing the validity of the ordinance by a sliding scale scrutiny as an alternative to either the traditional rational relationship or compelling governmental interest standards. Such an intermediate and variable judicial requirement totally ignores a host of cases establishing certain constitutionally preferred fundamental freedoms as a class apart from the infinite variety of interests regulable by the state within broad limits of reasonableness.

Point II will examine the Constitutional dimension of Plaintiffs' claim to reside together in a one family house, considered both abolutely (privacy and association) and comparatively to other permitted uses (equal protection). It will be demonstrated that privacy in the constitutional sense is not regulated by the Belle Terre ordinance and that Plaintiff's interest in associating together for residential purposes is neither fundamental nor absolute; but qualified by the Village's power to regulate the use of land and establish classifications rationally related to legitimate public purposes.

Point III will set forth the legitimate public purposes that land use regulations may pursue and demonstrate that occupancy of one family houses by traditional families is rationally adapted to carrying out such purposes.

A final brief point is addressed to plaintiffs' argument based on the constitutional right to travel.

POINT I

The Court of Appeals erred in judging the justifiability of the Ordinance according to a variable scrutiny standard depending on the "importance" of the interest adversely affected.

Viewed only as authority *United States Dept. of Agriculture* v. *Moreno*, 93 S.Ct. 2821, would seem dispositive of the argument that some stricter standard of review than rational relationship applies to laws distinguishing traditional families from unrelated groups; for in that case this Court with near unanimity reasoned that the validity of coverage provisions of the Food Stamp Act depended upon whether they rationally furthered any legiti-

mate purpose of the Act. Insofar as the zoning ordinance affects Plaintiffs' interest in accecss to housing of their choice this Court's holding in *Lindsey* v. *Normet*, 405 U.S. 56, also makes applicable the rational relationship test.

In invalidating the zoning ordinance in this case, the Court of Appeals disregarded the holdings of this Court and opted for a "more flexible and equitable approach, which permits consideration to be given to evidence of the nature of the unequal classification under attack, the nature of the rights adversely affected, and the governmental interest urged in support of it." (J.S. 16a)

Appellants do not wish to rely only on the conflict between the sliding scale approach used below and the holdings of this Court in the *Lindsey* and *Moreno* cases. The error of the Court of Appeals' approach goes deeper than that.

The distinction between the broad spectrum of legitimate interests affected by state laws and the limited types of specially constitutionally protected rights is basic to our constitutional law. The strict judicial scrutiny undertaken when laws impinge on preferred freedoms is of long standing and not limited to equal protection cases. If a work requirement incident to the administration of unemployment compensation indirectly impinges on the First Amendment value of free exercise of religion a merely legitimate state purpose is insufficient. A balancing approach with the lesser means requirement is applied (*Sherbert* v. *Verner*, 374 U.S. 398); similarly with compulsory education laws that affect rights of conscience (*Wisconsin* v. *Yoder*, 406 U.S. 205). If a state's legitimate concern for the qualifications of its school teachers is expressed in a disclosure law that chills freedom of expression it is invalid because "even

though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." (*Shelton* v. *Tucker*, 364 U.S. 479; *accord*, *Roe* v. *Wade*, 410 U.S. 113).

The "strict judicial scrutiny" scope of review is commonly called the "new" equal protection doctrine. Our point is that, insofar as strict scrutiny is invoked because a classification impinges on a fundamental constitutional right it is not new at all; nor is it a phenomenon unique to equal protection issues raised because a legislative classification is involved. It is part of a total approach long followed by this Court in any case in which state laws interfere with the enjoyment of preferred rights secured expressly or implicitly by the Bill of Rights.

The entire system of judicial protection of preferred freedoms painstakingly built up by many cases over a long time rests on the understanding that there is a difference in kind, not merely in degree, between the few rights so fundamental as to be enshrined in the Constitution and the infinite variety of individual and social interests, all legitimate and worthy of protection, which are subject to compromise, adjustment and partial or total recognition through our majoritarian political process. As to these the Constitution requires only that they not be sacrificed arbitrarily, by laws not rooted in the reasonable pursuit of constitutionally permissible public purposes. This is the test under traditional substantive due process and is the same basic principle followed in equal protection.

The suggestion advocated in some writings and adopted by the Court below, that the Court exercise a variable strict

scrutiny according to a sliding scale of importance or fundamentality of the subject of a classification, fails to recognize the basic dichotomy central to the preferred freedom doctrine. It is a narrow gauge effort to tinker with the equal protection clause in a way inconsistent with larger principles of which issues of legislative classifications form only a small part. As this Court has only recently emphasized, it is not an appropriate judicial function to create new substantive constitutional rights under the guise of equal protection (*San Antonio Indep. School Dist.* v. *Rodriguez*, 93 S. Ct. 1278.

POINT II

The Zoning Ordinance does not abridge any constitutional right of privacy to which the students are entitled nor does it impinge upon their right to associate freely for purposes which are constitutionally protected.

Introductory

The plaintiffs assert that any limitation on their desire to locate their type of occupancy any place they choose violates their right to privacy and association. This novel argument flies in the face of the basic postulate of zoning, upheld in *Euclid* v. *Ambler Realty Co.*, 272 U.S. 365, that differing types of occupancy, each legitimate and constitutionally protected, may be separated and located in different zoning districts. Two families might find it convenient or even economically imperative to occupy together a large one-family house in a single family zoning district; that would not give them a constitutional right to do so however. The division of types of occupancy into one versus two family rests on a long-recognized rational basis of public welfare

and, as such, prevails over the personal autonomy of persons wishing to create occupancies incompatible with the zoning scheme. The plaintiff students' interest in this case is actually one of convenience pure and simple. However profound the concepts which they try to assimilate to their cause and however grand the rhetoric with which they surround their position it all comes to the same thing; a group of students want to combine to occupy in a zone legally limited to single family occupancy. They have no real interest beyond the desire to occupy the house. Take away the house and these students have no "sacred bond" or any other significant group identity or interest.

With regard to traditional families the Village sets apart the land because of what the family is; the plaintiff group is what it is because it wants to use the land. This is not the stuff out of which can be concocted a constitutional right to override lawful zoning arrangements.

Appellees' private conduct is not at issue

The Belle Terre Zoning Ordinance *quantitatively* restricts the *number of persons* who may occupy a single family dwelling. It places no express limitation whatsoever on the conduct of any individual legally residing in the community nor does it exclude any particular class of individual from such residence. The Village, which occupies less than one square mile of a 270 square mile township, is seeking merely to limit its population and thereby preserve its rural character.

The right of privacy cases of *Griswold* v. *Connecticut*, 381 U.S. 379; *Eisenstadt* v. *Baird*, 405 U.S. 438, and *Stanley* v. *Georgia*, 394 U.S. 557, cited by Appellees in the

Court of Appeals all deal with the state's right to legislate private morals. These cases are inapposite here since the ordinance does not address itself to the students' morals or to anyone else's. It expressly permits unmarried adults to occupy a single family dwelling in the Village. It merely limits their number to two. No restriction is placed on their sex; they may both be male, both female, or each of opposite sexes. No proscription is placed upon the manner in which they conduct themselves in the privacy of their own home. Their numbers are, however, limited so that the consequences of their conduct do not extend beyond the line of privacy which circumscribes their home to the detriment of their neighborhood.

Practices such as the pooling of funds by six adults each with an independent source of income to pay inflated rents thereby upsetting the community norm are discouraged by the ordinance. Avoidance of traffic congestion, air pollution, and danger to school children crossing streets are goals of the ordinance which indirectly limits the number of automobiles operated in the community. An abundance of stable families to provide an environment comportable with parents' ideals for raising their children is an end which the ordinance does in fact promote. The practices of individuals in the privacy of their own homes, be they of a sexual, academic, religious or political nature are neither addressed or circumscribed by the ordinance.

The constitutional right of privacy that has been found in the First, Ninth, and Fourteenth Amendments is a limited one. "[O]nly *personal rights* that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty' . . . are included in this guarantee of personal privacy" *Roe*

v. *Wade*, 410 U.S. 113, 152 (emphasis added) (citations omitted). The zoning ordinance does not "reach in" to plaintiffs' home in an attempt to dictate their private behavior or life style. It has to do with what types of occupancy the land may be used for—possession of land being an open and notorious fact. If a family occupies the house it may adopt whatever life style it wishes; if a student group attempts to occupy the premises it is an illegal occupancy without regard to their private mores. Surely, if the Dickmans, who own the house, lived there and rented rooms to several student boarders it would not be argued that there was a constitutional right to so flout the one-family zoning. Yet the same associational and life style arguments could be made there that are made here; a constitutional difference could not turn on the details of the domestic arrangement. It is thus apparent that respondents are really challenging the municipal power to have any one-family zones at all—as distinguished from boarding house and other multiple uses.

No constitutional right of association is infringed

Like the right of privacy, freedom of association is not without bounds. The right of association is an outgrowth of the First Amendment guarantee of free expression which has been held to carry with it the right to associate for the purpose of effective political expression and action. *NAACP* v. *Alabama*, 357 U.S. 449; *Shelton* v. *Tucker*, 364 U.S. 479. It has been extended to association to achieve the right to effective access to the courts. *NAACP* v. *Button*, 371 U.S. 415; *Brotherhood of R.R. Trainmen* v. *Virginia State Bar*, 377 U.S. 1. All of the decisions have dealt with association as the sole practical means to the accomplishment of

some constitutionally protected goal. None have established a right of association simpliciter.

Joint residence and mutuality of association are certainly not synonymous. Plaintiffs' desire of a forum for scholarly exchange does not necessitate, for its satisfaction, a household arrangement violative of the Belle Terre zoning ordinance. Surely, students seeking to benefit from the ideas of their contemporaries have open to them options capable of affording opportunity for intelligent debate. The Belle Terre ordinance doesn't prohibit students greater in number than two from visting a single family dwelling; it merely proscribes their residence there. Furthermore, in this particular case, the State University at Stony Brook has furnished the students, at great taxpayer expense, with facilities adequate to provide the desired forum.

Plaintiffs have failed to show any fundamental right that will be denied them as a result of the Village's proscription of their occupancy of a single family dwelling. They instead contend that such occupancy is per se such a right, a position which is supported neither by the language of the Constitution nor the decisions of this Court. Any affirmative right of association, not supportive of an underlying fundamental interest, must partake simply of the general liberty protected from arbitrary limitation by the substantive due process guarantees of the Fifth and Fourteenth amendments. The case of *Roberts* v. *Clement*, 252 F. Supp. 835 (E.D. Tenn.), cited by respondents in the court below involved a state police regulation barring nudist camps anywhere in the state. The court held the law void for vagueness. The concurring opinion held the secluded,

unobstrusive practice of nudity protected by substantive due process from state limitation. The opinion rests on the proposition that private behavior which does not affect third persons is immune from state imposed morality—a situation in no way resembling that in this case.

In summary, the right of association, in its affirmative aspect, *i.e.*, the right to associate as an end in itself and not as incident to another constitutionally protected right, is a liberty not to be denied arbitrarily, without substantive due process. The state's interest in morality may be held insufficient for this purpose since injury to the public is hard to discern. In none of the cases, however, is it asserted that the right of association can be exercised in defiance of state law which rests on a reasonable ground of public welfare. Judge Darr's concurrence in the *Roberts* case never suggested that the right of nudists to associate gave them the right to maintain a nudist camp in an A-1 residence district. As Justice Black wrote for the court in *Adderly* v. *Florida*, 385 U.S. 242, constitutional rights, even preferred freedoms of the First Amendment, can be exercised only where people have a right to be for such purpose. If the right of free expression would not give respondents the right to establish a printing factory in a single family residence district then their right to associate cannot protect them in aggregating an unlimited number of unrelated dwellers under a single roof in the same residence district.

The ordinance does not unreasonably burden the legitimate interests of unrelated persons in access to housing

Appellants' basic position on this appeal is that since the ordinance neither uses suspect criteria nor attempts to regu-

late access to a fundamental right it must be sustained if it is rationally adapted to the achievement of a legitimate public purpose, as argued in Point III of this brief. Yet this is a fluid area of constitutional law and we are mindful of the Court's emphasis in *San Antonio Indep. School Dist.* v. *Rodriguez*, 93 S. Ct. 1278, of the difference between absolute or total exclusion from a benefit as opposed to relative or partial disability. It is against this background that we wish to emphasize that under the total pattern of state action on this record Plaintiff students were not denied a "meaningful opportunity to enjoy" convenient and suitable housing.

The District Court recognized that "zoning exclusions could, no doubt, be carried to the point of unconstitutional deprivation of right simply by selection." (J.S. 75a). The single zone which the Village constitutes was held proper "in view of its small size and apparent state of development. It is not claimed that the Village was, as it were, gerrymandered into existence so that it could be a single district village." (J.S. 76a). This accords with all available authority. *Matter of Fox Meadow Estates* v. *Culley*, 233 App. Div. 250, 252 N.Y.S. 178, *aff'd*, 261 N.Y. 506; *Nehrbas* v. *Incorporated Village of Lloyd Harbor*, 147 N.Y.S. 2d 738, *modified*, 1 App. Div. 2d 1034, 152 N.Y.S. 2d 738, *aff'd*, 2 N.Y. 2d 190; *Valley View Village* v. *Proffett*, 221 F. 2d 412 (6th Cir.).

Moreover, the Court below noted that the plaintiffs faced no legal obstacle to finding suitable housing elsewhere near their University. The Court emphasized that Belle Terre, a village of 700 people, is located wholly within the Town of Brookhaven (where the University is also located) with a

population of 250,000, and zoning that would permit group occupancy even in its highest zoning district. (J.S. 58a). Plaintiffs attempt to blunt the significance of the facts noted below by citing several village ordinances limiting unrelated group occupancy in various ways. Taking just the four villages in the Town of Brookhaven:*

Village	*Population*	*Land Area in Sq. miles*
Belle Terre	678	.8
Old Field	812	2.0
Port Jefferson	5,512	2.8
Bellport	3,046	1.0

The other Brookhaven Villages (Patchogue, Shoreham and Poquott) have no relevant restrictions. In comparing of the total population and land area affected by a limited definition of "family" with the remainder of the Town of Brookhaven, it is manifest that Judge Dooling was correct in his characterization of plaintiffs' situation.

The latitude of housing legally available to the plaintiffs in the Town of Brookhaven is in addition to the dormitory facilities at Stony Brook which are under-utilized and afford a wide range of choices from private rooms to suites which accommodate from four to six students. (J.S. 57a).

The poverty of the students' arguments of discrimination and deprivation of rights is apparent when one considers the bounty the state has lavished on them as a distinct class

* The Village population figures are taken from the 1970 Census: U.S. Dept. of Commerce, Bureau of Census (March 1973). The land area and Town population figures are found in Special Report on Municipal Affairs, State Comptroller, Leg. Doc. No. 95, transmitted to legislature April 2, 1970.

of citizens. Not only have public funds been devoted to the creation of the State University itself but also upon dormitory housing within which students, individually and groups, can enjoy to the fullest the scholarly community upon which they predicate their associational claims. No doubt realizing, as Judge Dooling pointed out (J.S. 78a-79a), that student groups create both benefits and problems for the community in which they live, the state has singled them out, not for discriminatory or inferior treatment, but as the particular objects of public bounty and solicitude. It is not everyone that enjoys publicly subsidized housing within walking distance of their work.

Yet the Court of Appeals, we submit inconsistently with its earlier rejection of the fundamental rights argument (J.S. 13a-14a), held the right of unrelated groups of persons to occupy a one family house not only fundamental but well nigh absolute:

> Nor are we persuaded to sustain the Belle Terre ordinance by the fact that dormitory housing is available to appellants at Stony Brook or one-family housing available in other nearby communities which have not enacted exclusionary zoning of the type here under attack. The fact that an unconstitutional ordinance is limited in geographical scope does not make it any less an abridgement of guaranteed constitutional rights. See Buchanan v. Warley, 245 U.S. 60, 38 S.Ct. 16, 62 L.Ed. 149 (1917); Murdock v. Pennsylvania, 319 U.S. 105, 63 S. Ct. 870, 87 L.Ed. 1292 (1943). Appellants are entitled, subject to lawful and reasonable local laws, to travel and settle down where they please. See King v. New Rochelle Municipal Housing Authority, 442 F.2d 646, 648 (2d Cir. 1971); Cole v. Housing Authority, 435 F. 2d 807 (1st Cir. 1970), affirming 312 F.Supp.

692 (D.R.I.1970). If Belle Terre is permitted to exclude appellants from its borders, other nearby communities, in the absence of a coordinated, enforceable regional plan, may be expected to do likewise. Indeed, many already have.[9] The availability of housing in another community, therefore, does not constitute a defense. Carried to its logical conclusion such an argument might, after all local communities in an entire area had adopted unjustifiable exclusionary zoning laws, relegate those discriminated against, in this age of the jet plane and superhighway, to distant regions or even to other states. (J.S. 23a-24a)

The argument accepted by the Court of Appeals is a variant of the discredited camel's nose in the tent reasoning. The imagined future abuse of a power is advanced as an argument against the existence of the power. The fallacy lies in the supposed inability of the courts to distinguish between lawful and reasonable exertions of state police power and (as yet nonexistent) abuses of it. To such an argument (that the power to tax is the power to destroy) Justice Holmes gave the succinct and enduring answer: "The power to tax is not the power to destroy while this Court sits." (*Panhandle Oil Co.* v. *Mississippi, ex rel. Knox*, 277 U.S. 218 at 223 (dissenting opinion).

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[9] See, e.g., Building Zone Ordinance of Village of Babylon, Art. I. § 100(28); Building Zone Ordinance of Sag Harbor, Art. II, § 1(d); Ordinances of the Village of Bellport, Ch. 10, Art. II, § 206.1; Zoning Ordinance, General Regulations of Town of East Hampton, § 309.5; Unified Code of Ordinances, The Village of Oldfield, Art. VII, Ch. 7, Zoning, Part. 7.2. (footnote by the court).

Belle Terre, because of its small size, is constituted wholly as a one family district. Larger communities, such as the Town of Brookhaven in which Belle Terre is situated, have multi-district zoning comprised of one and two family, multiple dwelling, commercial and industrial. A decision that a municipality may reasonably limit the number of unrelated individuals who may aggregate together under one roof in a one family district does not justify excluding them from other districts not limited to single family occupancy. The line would thus be easy to draw and would not involve the exclusionary consequences envisioned by the Court of Appeals.

Moreover, the commands of the Fourteenth Amendment are addressed to the State which is consequently accountable for the actions of its municipal subdivisions. Should any of the speculative fears hypothesized by the Court of Appeals ever materialize, and unrelated groups ever find themselves deprived of a meaningful opportunity to reside in convenient and fitting locations through the uncoordinated acts of local zoning authorities, then the constitutional responsibility would devolve upon the State to intervene—under penalty of invalidating all such local restrictions.

Of course, if one postulates at the outset an independently existing constitutional right to assemble for residential purposes anywhere one chooses, the Belle Terre ordinance is a total deprivation of that right. But in point of law no such right exists. Not even the most nearly absolute of preferred freedoms, such as the First Amendment right of free speech, would entitle someone to set up a newspaper printing factory in a one family residence district. As the Court said in *Palo Alto Tenants Union* v. *Morgan*, 321 F. Supp. 908, at 911:

> Plaintiffs are unquestionably sincere in seeking to devise and test new life-styles, but the communes they have formed are legally indistinguishable from such traditional living groups as religious communities and residence clubs. The right to form such groups may be constitutionally protected but the right to live under the same roof, in any part of the city they choose, is not.

Nor are the cases cited by the Court of Appeals, *Buchanan* v. *Warley* and *Murdock* v. *Pennsylvania*, apposite to the problem at hand. In both cases there was an independently unconstitutional reason for the exclusion—race and religion respectively. Absent such an invidious classifying factor; and absent an antecedent fundamental constitutionally protected right, the question comes back to the equal protection inquiry: whether the line drawn by the law, admitting families and unrelated twosomes but excluding all other occupancies, is rationally adapted to the achievement of legitimate governmental purposes. To this question we now turn.

POINT III

The Zoning Ordinance is justified as an end in itself in that families are per se legitimate objects of public concern and support. It is further justified as a rational means toward the accomplishment of other lawful objects such as density control, community stability and rent control.

Introductory

The discussion under this heading will concern itself first with the threshold question, held adversely to Appellants below, whether a social preference in favor of promoting and supporting family organization through residential proximity is in itself a proper object of state police power. If this Court agrees with Appellants' position that there is nothing in the United States Constitution to prevent the State, through its municipal subdivision, from adopting this view as its public policy, then the ordinance must be upheld independently of any additional justification related to other governmental purposes.

Should the Court disagree with Appellants' position as stated above or not wish to decide the question in this case there are other adequate and independent governmental purposes traditionally associated with zoning towards which the one family zoning classification is rationally adapted. Whether these additional public purposes are deemed co-equal or subsidiary, their existence is sufficient to sustain the ordinance (*McGinnis* v. *Royster*, 410 U.S. 263).

The ordinance is justified as an expression of a public policy supportive of traditional families through residential proximity and maintainance of a family neighborhood

The Village of Belle Terre did not define what a family is. Thousands of years of Western Civilization and every other civilization have done that. Whether it be the extended family of a more leisurely age or the nuclear family of today the role of the family in raising and training successive generations of the species makes it more important, we dare say, than any other social or legal institution—executives, legislatures, courts, corporations or student fraternities. If any freedom not specifically mentioned in the Bill of Rights enjoys a "preferred position" in the law it is most certainly the family.

The desire to assure housing for families is in itself a legitimate state interest. In the fulfilment of certain social preferences the state may recognize certain classes of citizens as appropriate subjects of preferential treatment. Familiar examples in the housing area are low income persons and the elderly. Even the plaintiffs themselves constitute a group whom the state has seen fit to endow with preferential housing accommodations not open to other individuals or groups. It should occasion no wonder, then, that the family, an entity already recognized with special entitlements in so many areas of the law, should commend itself to special consideration in the context of access to housing.

The family character of Belle Terre was not the result of any master plan. As the District Court found: "It is not claimed that the village was, as it were, gerrymandered into existence so that it could be a single-district village." (J.S. 76a). And as Judge Timbers stated in his dissent below:

> "The Belle Terre ordinance apparently was enacted for the purpose of zoning for a particular neighborhood character in a community that had always been of that character. The development decision was made over a period of time by the families moving into the village. The zoning ordinance therefore merely reinforced the sum of many individual choices. See Mandelker, Managing Our Urban Environment 707 (2d ed. 1971)" (J.S. 35a).

At least in the case of a small outlying Village there is nothing irrational in believing that the proximity of families with children to other families with children promotes interrelationships among both adults and children mutually beneficial to all concerned. Of course, there are more tangible justifications in terms of community stability, control of rental values and the problems of density. These will be discussed separately and also have their bearing on the family character of the neighborhood. But the simple public policy of supporting the welfare of family organization through residential proximity is within the state police power. It rests by and large on imponderables that are intuitively perceived rather than empirically demonstrated, but is nonetheless valid on that account (see the discussion of unprovable assumptions in *Paris Adult Theatre I* v. *Slaton*, 93 S. Ct. 2628 at 2637).

To say, as did the Court of Appeals, that "such a goal fails to fall within the proper exercise of state police power" (J.S. 18a) is simply an unjustified *ipse dixit* thoroughly out of line with the favored legal status of families generally and the appropriate reach of judicial power over legislative judgments. This is a large and still diverse country, with

provincial villages as well as sophisticated cities; and we do well to remember the words of Justice Holmes:

> But a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of laissez faire. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.
>
> (*Lochner* v. *New York*, 198 U.S. 45, 76).

And as the great Justice said in another case:

> While the courts must exercise a judgment of their own, it by no means is true that every law is void which may seem to the judges who pass upon it excessive, unsuited to its obstensible end, or based upon conceptions of morality with which they disagree. Considerable latitude must be allowed for differences of view as well as for possible peculiar conditions which this court can know but imperfectly, if at all. Otherwise a constitution, instead of embodying only relatively fundamental rules of right, as generally understood by all English-speaking communities, would become the partisan of a particular set of ethical or economical opinions, which by no means are held *semper ubique et ab omnibus.*
>
> (*Otis* v. *Parker*, 187 U.S. 606, 608-09).

We recognize as valid and do not seek to avoid in any way the force of this Court's observation in *Moreno* that "a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest." (93

S. Ct. 2821 at 2826). But there is a difference between a governmental desire to confer a benefit on families and a desire to penalize unrelated groups.

The law books are filled with instances of the privileges, bounties and protections with which, as Judge Dooling put it, "the states, and all of them, and the Federal government alike aggressively surround the traditional family of parents and their children, reaching from family court laws, through laws of inheritance to tax laws." (J.S. 74a).

If one of those bounties is the creation of single family zoning districts within large cities and towns or, as here, the incorporation of tiny family villages within larger township units, there is nothing unusual or discriminatory in the existence of the sheltered and tranquil family environment so created. This constitutes a legal benefit and preference for family organization and is justified as one among many applications of state solicitude. Clearly, the solicitude toward the family cannot be construed as hostility towards other land uses. Judge Dooling so concluded in stating: "The essence of zoning is that its selection is not regarded as invidiously discriminatory against uses not selected. *Cf. Kort* v. *City of Los Angeles*, C.A. Cal. 1942, 52 Cal. App. 804, 127 Pac. 2d 66, 70. Zoning presupposes that convenient and fitting locations can be found for every legitimate land use, so that no pursuit of any use is denied, or disparaged." (J.S. 80a). This conclusion is demonstrably applicable to this case, in which Belle Terre is but a tiny outpost in the Town of Brookhaven (population 250,000) which has several zoning districts, even the highest of which, as the District Court determined, would permit the students' domestic arrangement (J.S. 58a).

Insofar as the ordinance may embody a governmental preference for the family as such the question may arise: How is the allowance for two unrelated persons to be accounted for? Why allow any? Of course, this approach amounts to faulting the ordinance because it seems unaccountably generous in light of the suggested purpose. Whether an inconsistency in the direction of greater permissiveness would be of constitutional significance is doubtful. Yet it is appropriate to discover some basis in reasonable public policy to save the law from even this charge of inconsistency.

First, to think of the family as a group of persons related by blood, adoption or marriage naturally leads to the case of a single individual living alone. Is he a family? Whether he is or not can be a matter of definition. In any event the idea of telling the owner of a house that he cannot occupy it alone is ridiculous. Clearly, the draftsmen of the ordinance may and should make provision for the right of a single occupant of a house. Having recognized this much, might a reasonable legislator go a step further? It requires no great insight or experience with human character to realize that few people like to live solitary lives. And so the draftsmen may take the extra step and make allowance for a co-occupant.

Beyond this point the various public purposes dictating a limit on unrelated occupancy of one family houses may be seen to outweigh countervailing interests.

Insofar as the ordinance serves to regulate car ownership and traffic hazards, especially in respect of children, the provision for two unrelated persons approximates the normal use of cars by families. The two person limit also

serves the purpose of equalizing the competitive position of families and unrelated groups in bargaining for rental of houses. Few families have more than two wage earners. Lastly, the figure two is close to the average size of families in Belle Terre (three). In sum, if the Village's power to distinguish between families and unrelated groups be admitted in principle, the legislative limit of two unrelated persons is as appropriate to the relevant purposes as any other that could be suggested. It is a matter of wisdom not power and a determination as to which the Village is entitled to some flexibility.

The ordinance is rationally adapted to the zoning purpose of controlling density and related problems of intensity of land use

Were no distinction to be drawn between a genuinely related family versus unrelated individuals desiring to dwell together as a sort of residence club, the zoning objectives of density control, preservation of neighborhood character, and control of such land use intensity problems as traffic would be frustrated. These objectives form not only a rational basis for zoning but part of its essential reason for being (Anderson, American Law of Zoning, Sections 7.01, 7.06, 7.08).

In the absence of a distinction between blood relatives and others, the Courts have quite properly construed zoning ordinances strictly against the municipality and in favor of the property owner. For example, in New York, although the Appellate Division, Second Department, has held that 23 college students living together did not constitute a family (*Schenectady* v. *Alumni Assn.*, 5 App. Div. 2d 18, 168 N.Y.S. 2d 754, the Third Department has held that 60 students living together constituted a family (*Application*

of Laporte, 2 App. Div. 2d, 710, 152 N.Y.S. 2d 916, *aff'd*, 2 N.Y. 2d 921 Other jurisdictions have experienced similar difficulties with open-ended definitions of "family" (*Robertson* v. *Western Baptist Hospital*, 267 S.W.2d 395 (Ky.), (20 nurses sharing one residence held to be a family). Indeed, the unlimited number of strangers who might live together as a "family" under an Illinois ordinance resulted in the Court striking down the ordinance's prohibition on multiple dwelling units within a building. If numerous strangers may live together it is arbitrary to prevent them from living separately, (*Harman* v. *City of Peoria*, 373 Ill. 594, 27 N.E. 2d, 525).

Thus, it may be seen that a municipality's right to regulate boarding house uses and other density problems is meaningless without some restriction on the number of unrelated individuals who may live together in a dwelling. The fact that no numerical limit is imposed upon the number of blood relatives who may constitute a family does not introduce an irrational or discriminatory distinction. The number of children, brothers, uncles, grand-parents or other relatives who may be added to the conventional family unit tends to be self-limiting. This fact, together with a laudable wish not to intrude on a valued social institution accounts for the absence of a numerical limit on conventional family occupancy. No self-limiting factor, no built-in institutional restraint applies to communal living by unrelated individuals. To the contrary, the property owner's profit motive pushes strongly in the other direction.

Moreover, in the case of unrelated groups, greater density, especially of individuals leading separate lives, means increased land use intensity, such as parking and traffic.

The increase in traffic is particularly of concern to a family community in which children play and ride bicycles in the roads. The importance of density control as a prophylactic measure is particularly important to a small Village such as Belle Terre which lacks the corps of public employees necessary to regulate traffic directly.

The ordinance is rationally adapted to preventing the escalation of rents beyond family means through the superior bargaining power of unrelated groups

It seems obvious to us that a group of unrelated wage earners (or students, each with separate financial resources) pooling their purchasing power can constitute potentially destructive competition in the rental housing market against families, which have one, or at most, two, incomes.

The vulnerability of families to the progressively superior bargaining position of unrelated groups united in bidding for available houses is a problem which has occupied the attention of Courts and commentators.

(*See* Cope, Zoning: The Definition of "Family", 62 Ill. Bar Journal 80 (1973)).

Only in New Jersey has an ordinance such as that involved here been held unconstitutional.* It is worth noting the Court's reasoning because it bears on the rent escalation question and departs greatly from this Court's position on economic regulations.

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* Plantiffs' reliance on the Illinois case of *City of Des Plaines* v. *Trottner*, 34 Ill. 2d 432, 216 N.E.2d 116, is misplaced. The ordinance was invalidated on a state law ground of ultra vires. The Court expressly left open the constitutional question. The Illinois legislature has since overturned the Trottner holding. See Ill. Rev. Stat. 1969, Ch. 24, sec. 11-13-1, restoring local power to classify "family" in terms of blood, marriage or adoption.

In *Kirsch Holding Co.* v. *Borough of Manasquan*, 59 N.J. 241, 281 A.2d 516, the Court viewed the limitations on "family" as directed primarily at seasonal rentals to persons who were ill-behaved. With such an assumption, the Court concluded that direct police regulations of obnoxious behavior were the only permissible way to deal with the evil. The Court relied on and adopted the earlier lower court case of *Gabe Collins Realty, Inc.* v. *City of Margate City*, 112 N.J. Super. 341, 271 A.2d 430 (App. Div.), which, in voiding an ordinance identical to that of Belle Terre, reasoned:

> "The economic stake of the plaintiff in freedom from the restriction of the ordinance is that, by and large, greater rentals can be realized from groups than from normal families usually having only one wage-earning head." (271 A.2d at 431).

It is precisely this factor of escalating group rentals rendering family occupancy uncompetitive which constitutes one of the evils the zoning law seeks to preclude. Surely, we have outlived the era of substantive due process in which the economic interest of the property owner overrode the public right to promote the general welfare. It is now established that where public health, safety or welfare is served by a zoning requirement the economic injury to a property owner does not render the ordinance invalid (*Nattin Realty Inc.* v. *Ludewig*, 67 Misc. 2d 828, 324 N.Y.S. 2d 668), unless it deprives the owner of all beneficial use (*Salamar Builders Corp.* v. *Tuttle*, 29 N.Y. 2d 221), a situation not even approached in this case, (*Best* v. *Zoning Board*, 393 Pa. 106, 141 A.2d 606).

Even the Court in *Kirsch recognized* this fact:

> "From the owner's point of view, this type of (group) rental is a financial bonanza. He will have only one letting for the entire season, and by reason of group participation in the rental, he can secure a much higher return than a conventional family is willing or able to pay." (281 A.2d at 515).

In contrast to the New Jersey Courts, which apparently view such economic disparity as an argument for the property owner, the Village agrees with *Palo Alto Tenants Union* v. *Morgan*, 321 F. Supp. 908 (N.D. Calif.) that this economic picture constitutes one of the rational bases justifying the ordinance.

The same economic pressures noted by the courts and writers exist in Belle Terre. Two houses directly opposite the Dickman house, one a four bedroom and the other a six bedroom house previously rented for $350.00 per month (A 48-49). The Dickmans rented the house herein to the students for $500.00 per month (A 34). Small wonder that the Dickmans in their affidavit stated "It is in our economic interest to continue to rent to them [the students]." (A 37).

Plantiffs attempt to meet this justification by arguing that the Village's interest in controlling rents can be more narrowly secured by the adoption of rent controls. The Court of Appeals accepted this argument (J.S. 22a). There are three solid reasons why this position is untenable.

First, there was no proof by plaintiffs that the Village in fact had the option of adopting rent controls. The Village Law does not specifically include this within home rule and the State legislature has enacted vacancy decontrol legislation that supersedes local authority (N.Y. Consolidated Laws §§ 8605 (McKinney Supp. 1972)).

Second, it is quite reasonable for a municipality to refrain from the kind of rigidity associated with rent freeze or other forms of direct control. The Belle Terre ordinance permits the free play of market conditions to determine rental values among families (and two unrelated wage earners) while precluding the more destructive competition posed by larger numbers of independent wage earners united in bidding for a single family residence. This kind of limited *laissez faire* constitutes a legitimate economic attitude and renders unnecessary the kind of bureaucratic superstructure unsuited to a tiny political unit such as Belle Terre.

Third, and most fundamental, the kind of shopping for alternatives engaged in by the Court of Appeals at plaintiffs' urging is an inadmissible intrusion by the judiciary into legislative prerogative. Since it has been recognized by both case law and in the literature that one-family zoning indirectly keeps a control on escalating rents (in addition to its other justifications) that should be an end to the matter. The rational relation is established.

The ordinance is rationally adapted to minimizing transiency and promoting community stability

In Book V of the *Laws* Plato says "for there is no greater good in a state than that the citizens should be known to one another." (see The Portable Greek Reader, W. H. Auden ed. p. 547). In modern terms this is a desire for stability in a community. While this desire is unattainable in a City it is within the grasp of a tiny Village such as Belle Terre. The belief that transiency is incompatible with a family residential neighborhood underlies the familiar exclusion of hotels and boarding houses from one family residential zoning districts. No decision that we know of

disputes the legitimacy of stability as a goal of zoning. Plaintiffs did not dispute it below and the Court of Appeals itself said: "We are further asked to speculate that 'voluntary' families would pose greater parking, traffic and noise problems than would traditional families and that there would be a greater degree of transiency on the part of the former than the latter, thus weakening the stability of the community." (J.S. 20a). The Court then admitted: "If some or all of these hypothesized objectives were supportable, some form of such ordinance might conceivably be upheld as a valid exercise of state police power." (J.S. 20a) Yet both the District Court and the Court of Appeals rejected the justification, the latter holding: "To theorize that groups of unrelated members would have more occupants per house than would traditional family groups, or that they would price the latter out of the market or produce greater parking, noise or traffic problems, would be rank speculation, unsupported either by evidence or by facts that could be judicially noticed." (J.S. 20a-21a)

The Court of Appeals' misuse of the doctrine of judicial notice and its disregard of the presumption of constitutionality can only be due to an unawareness of the difference between adjucative facts and legislative facts. Or possibly it is an aspect of the hybrid scope of review invented in the present case. In any event it totally disregards bedrock doctrine of this Court. The question is not whether the lawmakers can prove the legislative facts upon which they proceeded in enacting the statute or ordinance; but whether the challenger can demonstrate "that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." (*Euclid* v. *Ambler Realty Co.*, 272 U.S.

365, 395; Accord. *McGowan* v. *Maryland*, 366 U.S. 420; *Dandridge* v. *Williams*, 397 U.S. 471; *Lindsey* v. *Normet*, 405 U.S. 56; *San Antonio Indep. School Dist.* v. *Rodriguez*, 93 S. Ct. 1278).

In addition to the error of commission discussed above, it is interesting that the Court of Appeals omitted the transiency-community stability justification from its catalogue of matters not proved or judicially noticed. It simply ignored the point in its own discussion and quoted a longer passage from the District Court opinion, the relevant part of which says: "But none of these observations reflects a universal truth. Family groups are mobile today, and not all family units are internally stable and well-disciplined." (J.S. 21a)

This quotation from a passing reference in the District Court's opinion constitutes the entire treatment the Court of Appeals gave to this rational basis supporting the constitutionality of the Village ordinance. Since this is all there is, let us examine it in light of what this Court has held, many times over, regarding the validity of legislative classifications. Must a legislative perception of characteristics calling for different classification reflect a "universal truth"? Does the fact that *not all* family groups have internal stability disentitle local law making bodies from acting on the general run of cases? Clearly no such mathematical perfection is required. Great latitude is allowed. Rough approximations are permitted. As this Court stated in *McGowan* v. *Maryland*:

> Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently

> than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it. . . . (366 U.S. 420, 425-26)

Numerous cases are in accord (*e.g.*, *Lindsley* v. *Natural Carbolic Gas Co.*, 220 U.S. 61; *Dandridge* v. *Williams*, 397 U.S. 471).

In light of the proper scope of review of legislative power to classify, it is not unreasonable to conclude that families tend to have greater stability than voluntary associations of individuals. Our history furnishes many examples of utopian community experiments. Many of these bands of people initially started out with strong bonds of religion or ideology holding them together. Many afforded a great measure of individual privacy into which to retreat when irritation, disagreement and other unsociable impulses threatened to dominate. Yet the history of these communities has been dissolution and failure. (Fogarty, American Utopianism (1972); Roberts, The New Communes: Coming Together in America (1971)).

How much more vulnerable to centrifugal forces are a group of students living cheek by jowl in a single family house, with no binding tie beyond the desire to occupy the house that brought them together in the first place. In point of stability there is no comparison with the traditional family whose emotional, biological and legal ties need no elaboration. The difference is not only rationally arguable;

it is manifest. We submit that the ordinance is rationally adapted to the legitimate public purpose of maintaining community stability for the benefit of the adults and children of Belle Terre.

POINT IV

The Zoning Ordinance has no relation whatever to the right to travel.

The argument based on the right to travel is wholly without support in the decisions of this Court and if accepted would constitute a *deus ex machina* to invalidate any state regulation of a local activity. Each and every case involving this right has been one where the state directly predicated some right or benefit on the applicant's duration in the state (*Shapiro* v. *Thompson*, 394 U.S. 618 (residency requirement for welfare); *Dunn* v. *Blumstein*, 405 U.S. 331, (voting residency requirements); *Cole* v. *Housing Auth. of Newport*, 435 F. 2d 807 (1st Cir.) (residency requirement for public housing)).

In the present case, there is no connection between the number of unrelated individuals who may occupy property as a family use and the duration of their residency or where they came from. It is little short of frivilous to isolate some purely local activity which is prohibited by law and link it up with the right to travel by postulating a deterrent effect on the travel of persons who might want to enter the Village to perform the prohibited act. In such fashion could all legal prohibitions be said to indirectly infringe on the right to travel of those living elsewhere who would like to come to a municipality to engage in the illegal activity. If the pro-

hibition is one which the Village has the right to enact, then the desire of nonresidents to come in and violate the prohibition adds nothing to the constitutional argument.

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the Court of Appeals be reversed and the case remanded with a direction to dismiss the complaint.

Respectfully submitted,

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